in the
Supreme Court
of the
United States

October Term 1974

NO. 74-1401

GABRIEL BADARACCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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GABRIEL BADARACCO, Petitioner, prays that a Writ of Certiorari issue to review a Judgment of the United States Court of Appeals for the Fifth Circuit, entered March 14, 1975, rehearing denied April 8, 1975, affirming the June 12, 1974, Judgment and sentence of the United States District Court for the Southern District of Florida, adjudicating Petitioner guilty of possession of a controlled narcotic substance.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported in ____ F.2d ____, and is reprinted as Appendix A hereto, together with a copy of the Order denying rehearing (Appendix B).

JURISDICTION

The Judgment of the Fifth Circuit was entered on March 14, 1975, and a Petition for Rehearing was denied on April 8, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I.

WHETHER AN ADJUDICATION AND SENTENCE IN A CRIMINAL CASE MAY STAND WHERE THE TRIAL JUDGE PRECIPITOUSLY ACTS, THE DAY AFTER JURY TRIAL, ON MISINFORMATION AND MISUNDERSTANDING AS TO FACTS IN MITIGATION AND AS TO LAW PERTINENT TO ADJUDICATION AND SENTENCING?

II.

WHETHER MANDATORY DEPORTATION OF AN ALIEN FOR MINOR MISCONDUCT, ENGAGED IN LONG AFTER HE BECAME SETTLED IN THE UNITED STATES AND ASSIMILATED INTO AMERICAN CULTURE, IS SO UNJUSTIFIABLY DISCRIMINATORY AS TO VIOLATE EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS?

III.

WHETHER "AUTOMATIC" DEPORTATION OF AN ALIEN, FOR MERE SIMPLE POSSESSION OF A *DE MINIMUS* QUANTITY OF A PROHIBITED DRUG, IS INHERENTLY DISCRIMINATORY AND WITHOUT SUFFICIENT RATIONAL JUSTIFICATION, WHEN A CONVICTED MURDERER—ONE DANGEROUS TO OTHERS—WOULD NOT BE SO SUMMARILY AND HARSHLY TREATED?

STATEMENT OF THE CASE

Petitioner, an alien graduate student who has been in the United States since his preparatory school days, was arrested in Miami in 1974 and charged by information with possession and importation of 1.25 grams (approximately 1/25 of an ounce) of cocaine. The case of the UNITED STATES against Petitioner was tried before a jury in the United States District Court for the Southern District of Florida on June 10-11, 1974, and verdicts of *not* guilty on the importation charge and guilty on the possession charge were returned. [Jurisdiction is conferred upon the District Court by Title 18, United States Code, Section 3231.]

Following reading of the verdict late on June 11, Petitioner requested that the court withhold adjudication, pending the conduct of a pre-sentence investigation and preparation by Petitioner of a pre-sentence presentation on facts in mitigation and law pertinent to adjudication and sentencing. Yet, without explanation, the trial judge ordered appearance of Petitioner for sentencing at 3:00 P.M. on June 12, 1974.

Sentencing proceedings were in fact commenced at the set hour and date, at which time Petitioner presented what little evidence in mitigation he was able to gather in the short span of time between trial and sentencing and Petitioner's counsel presented his essentially unresearched interpretation of certain immigration statutes, having merely had the morning of June 12 to investigate the question of future impact of an adjudication on Petitioner, as an alien.

Petitioner requested at the hearing that the court withhold adjudication of guilt, the possession statute under which he was charged clearly evidencing congressional intent that adjudications be withheld where one does not appear to be a willful, dangerous and repetitive violator of the Act. 21 U.S.C. §844(b). Significantly, it was pointed out than an adjudication of guilt on the possession charge would likely result in Petitioner's "automatic deportation" under 8 U.S.C. §1251(a)(11), which authorizes the Attorney General of the United States to order one who has been convicted of "illicit possession" of drugs deported. Petitioner's counsel also described how an adjudication of guilt would likely proscribe Petitioner's becoming an accountant in the United States, his ultimate goal, and would likely result in official action being taken by federal or state authorities to bar Petitioner's continued education in the country.

Despite the clear questions raised by Petitioner regarding the propriety of an adjudication and despite the scant opportunity permitted Petitioner to present mitigating evidence and the law relevant to sentencing, the trial court adjudicated Petitioner guilty and placed him on probation for two years. The judge, concluding the misdemeanor possession charge was *not* encompassed by 8

U.S.C. §1251(a)(11)—not constituting "illicit possession" —and that Petitioner would *not* be subject to "automatic deportation", decided that the adjudication would not, in truth, have the impact feared by Petitioner. Nevertheless, the trial court expressly recommended in the Judgment that Petitioner *not* be deported, so that the adjudication would not have an unintended consequence.

While the court, at many points during the proceeding, expressed concern for Petitioner's future, in terms of education and admission into a profession, the court, without the benefit of any informed presentence investigation into the various states' accounting standards and into university admission policies and practices, appeared unconvinced Petitioner would be denied his professional license or graduate school admission by any fair-minded authorities.

Thereafter, Petitioner duly appealed to the Fifth Circuit Court of Appeals, asserting basically that the trial court erred in failing to withhold adjudication and refusing Petitioner a proper opportunity to prepare facts and law for the sentencing proceeding. Having discovered, following the adjudication, that the trial court's recommendation against deportation would *not*, in fact, be given its intended effect under 8 U.S.C. §1251(a)(11), merely because of the *type* of offense for which Petitioner was *found accountable*, Petitioner, alternatively, challenged the constitutionality of 8 U.S.C. §1251(a)(4), (a)(11), and (b), as they bore upon the sentencing process, under the equal protection clause and substantive due process. Rejecting *each* and *every* argument of Petitioner, the Fifth Circuit affirmed, without benefit of an opinion, the June 12, 1974, Judgment of the trial court, and further denied the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

AN ADJUDICATION AND SENTENCE IN A CRIMINAL CASE MAY NOT STAND WHERE THE TRIAL JUDGE ACTS ON MISINFORMATION AND MISUNDERSTANDING AS TO FACTS IN MITIGATION AND AS TO LAW PERTINENT TO THE ADJUDICATION AND SENTENCING PROCESS.

Fundamental fairness and due process of law command that a trial judge, when sentencing a defendant in a criminal cause, act only upon accurate information and complete knowledge of the law. *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970); *United States v. Wilson*, 450 F.2d 495 (4th Cir. 1971); *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971); *United States v. Freeman*, 462 F.2d 290 (D.C. Cir. 1972) (dictum).

A sentence and adjudication may not rest upon "a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation" and any "misinformation or misunderstanding that is materially untrue . . . or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970).

Similarly, it has been concluded in the Sixth Circuit that reliance by the sentencing court upon "improper factors or the failure of the sentencing court to evaluate the available information in light of facts relevant to sentenc-

ing" is proper ground for order by the appellate court of a new sentencing hearing. *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971).

The trial court in the instant case acted upon misinformation and insufficient information concerning character, background and ability of Petitioner, and the likely impact of an adjudication of guilt upon him as a student and applicant for professional admission to practice accountancy in the various states of his choice. The trial judge misunderstood applicable statutes and thus failed to properly consider at the hearing the implications under the law of an adjudication upon Petitioner's future rights and privileges as an alien in this country. This misinformation as to the law and lack of factual data as to background is a direct result of the court's insistence that the hearing upon the adjudication and sentence be held immediately following trial and that the case be disposed of without delay, however brief.

Petitioner made an attempt in the few hours between trial and sentencing to obtain evidence of good character and ability, and actually was able to tender to the court one telegram and several letters. However, he feels and actually advised the court that additional time would have yielded even more convincing proof of his good conduct record, scholastic ability, reverence for the law, and good morals. More important, it would have afforded Petitioner sufficient time to contact and canvas the various state accountancy boards in whose jurisdiction he contemplated practice to determine the effect of a conviction (as opposed to a withholding of adjudication) for misdemeanor possession of a Federally controlled substance.

Petitioner does not, however, view the absence of factual evidence in mitigation to be as significant as the trial court's reliance upon inaccurate information as to pertinent provisions of immigration and naturalization law. Despite the arguments of Petitioner, the trial judge heard and *accepted* arguments of counsel for the government that Petitioner would *not* be subject to automatic deportation and would not be hindered in his educational and professional pursuits. Following the sentencing, Petitioner learned that he was, in fact, *immediately* subject to the quite harsh punishment of deportation for simple possession of a controlled substance, albeit a misdemeanor under 8 U.S.C. §1251. *Gonzalez de Lara v. United States*, 439 F.2d 1316 (5th Cir. 1971); *Will v. Immigration & Naturalization Service*, 447 F.2d 529 (7th Cir. 1971). Additionally, Petitioner learned that the United States Immigration & Naturalization authorities were already taking steps to block renewal of his "I-20 Permit", to thereby preclude him from enrolling and remaining in graduate school.

Finally, the point should be made that the trial court acted precipitously, forthwith adjudicating Petitioner guilty, in bold disregard of the sentencing alternatives made available under 21 U.S.C. §844(b). Despite the punitive limits of the misdemeanor possession provision—imprisonment of not more than one year, or a fine of not more that $5,000.00, or both—Congress has indicated that a sentence within the express punitive limits may be more serious than is warranted in a given case. If circumstances are discovered, either before or after verdict, which serve to minimize the effect or impact of the conduct charged, the federal courts may opt *not* to adjudicate the defendant guilty and the court may place him on probation for a

term. Upon successful completion of the probation period, the court may discharge the defendant and dismiss proceedings against him, without there ever being an adjudication of guilt. The quite obvious purpose of this probation provision is to protect onetime possessors (as opposed to sellers or vendors) of drugs from the grossly detrimental consequences, both in terms of civil rights and future employment opportunities, of a single transgression, in which the defendant may be as much a weak victim as a willful transgressor.

Significantly, the Sixth Circuit Court of Appeals determined in *United States v. Daniels* that it is improper for a trial judge, in a sentencing hearing, to routinely impose the "regular" penalty, *especially* where the statute involved authorizes a lesser sentence upon showing legal or factual grounds of mitigation. 446 F.2d 967 (6th Cir. 1971).

Federal Rule of Criminal Procedure 32(a) provides that before "imposing sentence the court shall afford the defendant an opportunity to . . . present any information in mitigation of punishment." The Rule requires an "individualized" approach to sentencing. *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973). This approach assumes that counsel for defendant is given an adequate opportunity to prepare and present information in mitigation, and that adequate pre-sentence investigations are conducted and reports prepared. *Kuzminsky v. Woodard*, 307 F.2d 195 (D.C. Cir. 1962).

This Court has held in a 1949 case, *Williams v. New York*, that the trial judge must possess as much informa-

tion as possible concerning a defendant's background and characteristics, so that the punishment may "fit the offender and not merely the crime." 337 U.S. 241, 247 (1949). Similarly, it was held by this Court in *Williams v. Oklahoma* that "the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." 358 U.S. 576, 585 (1959); see also, *Criminal Law—Severity of Sentence, As Well As Sentencing Procedure, Is Subject to Appellate Review in the Eight Circuit*, 23 DRAKE L. REV. 191 (1973).

In sanctioning the conduct of the trial court in the instant cause, the Fifth Circuit has held a trial judge in any southeastern District Court may summarily adjudicate and cause the criminal defendant in every case to suffer the "standard" or "usual" sentence, without regard to or consideration of facts in mitigation or impact under the law of a criminal adjudication on the individual, even where the criminal statute involved authorizes and suggests the *withholding of an adjudication of guilt* in a proper case.

The conclusion and decision of the Fifth Circuit is in *direct conflict* with the decisions and holdings of this Court and other courts of appeals in this country, which establish under due process the proper level of examination and knowledge required of a trial judge *before* adjudication and sentencing in a criminal case. Thus, an important question of federal law has been framed for this Court's examination.

II. & III.

[In the interest of concise presentation, Arguments II & III have been combined.]

A. MANDATORY DEPORTATION OF AN ALIEN FOR MINOR MISCONDUCT, ENGAGED IN LONG AFTER HE BECAME SETTLED IN THE UNITED STATES AND ASSIMILATED INTO AMERICAN CULTURE, IS SO UNJUSTIFIABLY DISCRIMINATORY AS TO VIOLATE EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS.

B. "AUTOMATIC" DEPORTATION OF AN ALIEN, FOR MERE SIMPLE POSSESSION OF A *DE MINIMUS QUANTITY* OF A PROHIBITED DRUG, IS INHERENTLY DISCRIMINATORY AND WITHOUT SUFFICIENT RATIONAL JUSTIFICATION, WHEN A CONVICTED MURDERER—ONE DANGEROUS TO OTHERS—WOULD NOT BE SO SUMMARILY AND HARSHLY TREATED.

Some eighteen categories of activities are listed within 8 U.S.C. §1251(a) for which an alien will, following detection, be subject to "automatic deportation" from the United States, upon order of the Attorney General. Paragraph (4) of subsection (a) provides very generally that an alien convicted of two crimes involving "moral turpitude", not arising out of a single scheme of criminal misconduct, will be subject to immediate deportation. While

paragraph (4) applies very generally to all criminal conduct, Congress has placed a very specific provision in the statute which governs drug offenses only. Paragraph (11) permits the Attorney General to order deportation of one "convicted of a violation of, or a conspiracy to violate, any law or regulation relating to illicit possession of or traffic in narcotic drugs." Although two convictions upon offenses involving moral turpitude are required under paragraph (4), a single conviction upon a narcotics charge will be deemed sufficient to support a deportation order.

Yet, in subsection (b) of 8 U.S.C. §1251, Congress qualified the rather stringent deportation provisions of subsection (a) by permitting the trial judge in a given case to recommend that the defendant not be deported. This provision nullifies the effect on one's alien status of a conviction for a deportable offense, the judge having decided that the individual has not committed such a heinous offense as would merit deportation. Such a recommendation is binding upon the Attorney General.

Nevertheless, by its terms, the recommendation clause is not applicable to convictions for drug offenses, including *de minimus* possession violations. 8 U.S.C. §1251(b). Congress has carved out an exception to 8 U.S.C. §1251(b), depriving any recommendation against deportation by the trial judge in a drug case of its intended effect.

The above described deportation provisions, as they apply specifically to Petitioner, and more generally as to aliens as a class, are constitutionally deficient, for their effect is to deny aliens due process and equal protection of the law. In a landmark decision, this Court determined in 1886 that the equal protection clause protects all "per-

sons" within the United States, whether citizens or aliens, from unlawful discrimination. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

While the equal protection clause is by its terms specifically applicable only to the states, the federal courts have traditionally stated that the equal protection concept is implicit in the Fifth Amendment of the United States Constitution as it applies to the Federal Government, the "equal protection of the law" principle being "subsumed within the due process concept of the Fifth Amendment, which governs federal action." *Aqua Caliente Band v. Palm Springs*, 347 F. Supp. 42 (C.D. Cal. 1972); *Miller v. Laird*, 349 F. Supp. 1034 (D. D.C. 1972). According to this Court's decision in *Bolling v. Sharpe*, the concepts of equal protection and due process, "both stemming from our American ideal of fairness," are not necessarily mutually exclusive, but "discrimination may be so unjustified as to be violative of due process." 347 U.S. 497, 499 (1954). See also, *United States v. Cravan*, 478 F.2d 1329 (6th Cir. 1973); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

In order to determine whether a given governmental action contradicts or violates the equal protection concept, two tests have emerged. Comment, *Constitutional Protection of Aliens*, 40 TENN. L. REV. 235, 240 (1973). Under the traditional test the statute or governmental action is scrutinized to determine whether there exists a rational basis for the challenged classification. *Dandridge v. Williams*, 397 U.S. 471 (1970). Under a modern, more stringent test the Court will require that the governmental body show a "compelling governmental interest" in the discriminatory classification. Comment, *Constitutional*

Protection of Aliens, 40 TENN. L. REV. 235, 240 (1973). The compelling governmental interest test requires a showing that the classification is necessary to protect against "the gravest of abuses, endangering paramount interests." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Classifications which affect fundamental rights and which are inherently suspect will be examined to determine whether a compelling legislative interest exists and this Court has held that the government has the burden of proving a compelling public interest. *Shapiro v. Thompson*, 394 U.S. 618 (1970); *Loving v. Virginia*, 388 U.S. 1 (1967); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Korematsue v. United States*, 323 U.S. 214 (1944).

Significantly, this Court added alienage to race and nationality as an "immediately suspect classification", in the 1971 case of *Graham v. Richardson*. 403 U.S. 365 (1971). In holding the compelling governmental interest test to be applicable to alienage classifications, the Court stated:

> Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close, judicial scrutiny. Aliens as a class are a prime example of a discreet and insular minority . . . for whom such heightened judicial solicitude is appropriate.

Id. at 372.

Thus, the deportation statute material to the instant Petition must come under the scrutiny of the compelling governmental interest test. The statute is applicable solely to aliens—only an alien, not a citizen, convicted of crimes of "moral turpitude" or "illicit possession" of a narcotic drug is subject to the further penalty, in addition to normal criminal penalties, of "automatic" deportation. The statutory classification is, therefore, immediately and inherently suspect.

The very obvious purposes of 8 U.S.C. §1251 (a) (11) and (a)(4) are to eliminate the use of and traffic in narcotic drugs in the United States, and to discourage crimes involving "moral turpitude". Yet, these provisions apply exclusively to aliens, punishing them by the very severe mechanism of banishment. And it is significant that the deportation follows and is *in addition to* any other punishments imposed for violation of the specific criminal acts, to which all persons in the country are subject. Petitioner was convicted of a misdemeanor for simple possession and is being punished for a violation of 21 U.S.C. §844; yet, as an alien he is subject to the additional severe punitive measure of banishment, *despite* the trial court recommendation that he not be deported.

Petitioner certainly recognizes that persons who violate drug laws should be punished; but the obvious classification within 8 U.S.C. §1251(a)(11) and designation of aliens for an additional penalty is inherently oppressive and constitutes a denial of due process and equal protection of the laws. Imposed upon aliens are all the *obligations* of citizenship. Aliens pay taxes, serve in the military, on an equal footing with citizens, and are subject to all state and federal laws. As a concomitant to these obligations,

this Court has determined that aliens have a right to the protections of the Bill of Rights and that other "fundamental rights", such as the right to work and engage in the professions, may not be denied them. *Wong Wing v. United States*, 163 U.S. 228 (1896); *Sugarman v. Songall*, 93 S.Ct. 2842 (1973); *In re Griffiths*, 93 S.Ct. 2851 (1973). Certainly, in light of the very historic and significant role aliens have played in the United States, a "nation of immigrants", one must question whether the severe remedy of deportation, which serves to deprive an individual of his livelihood, liberty, property, and sometimes family, comports with common American concepts of equity, right and justice.

Substantive due process principles would also seem to render 8 U.S.C. §1251(a)(4), (a)(11), and (b), constitutionally deficient. These deportation provisions, as they interrelate and apply to Petitioner and other alien drug offenders, deny the accused fundamental fairness. The substantive due process concept, ancient but firmly established in constitutional law, commands that a law "be not unreasonable and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Sims v. Board of Education of the Independent School District No. 22*, 329 F. Supp. 678, 684 (D. N.M. 1971); *Roe v. Wade*, 410 U.S. 113 (1973).

The reasonableness of the challenged deportation provisions may be questioned on several different levels. As was earlier noted, 8 U.S.C. §1251 makes a distinction between crimes involving moral turpitude and drug offenses. If one is convicted of *two* crimes involving "moral turpitude", and the trial judge recommends against de-

portation, the individual will not be deported. However, if an alien is convicted of violating a single narcotics statute—a one-time offender—he will be deported, despite a recommendation by the trial judge to the contrary.

As another pointed example, an individual might murder two persons (a felony) under the "moral turpitude" provision and not be subject to deportation; yet, one convicted of simple use violation, possession of a narcotic (a misdemeanor), as was Petitioner in the instant case, is "automatically" deportable, the trial judge's recommendation to the contrary (as here) notwithstanding. The distinction made by the statute certainly lacks rationality, the punishment (deportation) failing to "have a real and substantial relation to the object sought to be attained," i.e., to terminate the commercial traffic in narcotic drugs. The punishment for which alien drug offenders are singled out—deportation without regard to Congress' announced purpose and intent—"is not reasonably calculated to cure the abuse," but goes beyond "the necessities of the case." *Roe v. Wade*, 410 U.S. 113 (1973).

Significantly, Petitioner has been an alien resident of the United States for many years, his preparatory school education and college education having been acquired in this country. He has been assimilated into the American system and culture, understanding and having a genuine appreciation for the laws of this nation. Sincere expressions of remorse were heard by the trial judge, Petitioner affirming and the trial judge apparently accepting, via probation, that there would be no likely further transgressions on his part. It should be pointed out that this affirmation has proven true, since the date of Petitioner's trial, his

conduct being in strict conformity with the law and there being no further attempt by him to experiment with any controlled substance.

Serious issues regarding constitutionality of the above described deportation provisions were presented to the Fifth Circuit, but were shunned by the court, as it summarily affirmed, without opinion, the trial court's adjudication and sentence. In its ruling, the Fifth Circuit decided against Petitioner on the very crucial constitutional and federal statutory questions presented above. The Fifth Circuit has thus decided important questions which should now be settled by this Court.

CONCLUSION

The trial judge adjudicated Petitioner guilty without giving his counsel an adequate or reasonable opportunity to research and present his interpretation of applicable provisions of criminal and deportation law, and to gather and present facts pertinent to Petitioner's character, morals, professional and scholastic ability, as well as his ability to continue, scholatically and professionally, in his long chosen profession, once he was the subject of a formal adjudication. According to decisions of this Court and other Circuit Courts, such conduct by a trial judge serves to deprive the accused of his due process rights under the Fifth Amendment. In affirming and approving the trial court's conduct, the Fifth Circuit has rendered a decision in pointed conflict with the clear and long-standing precedent of other appellate courts in the federal system.

In addition, Petitioner, a long term resident alien of this country, challenges the constitutionality of 8 U.S.C. §1251(a)(4), (a)(11), and (b), to the extent they prevent a trial judge from making a binding and effective recommendation against deportation and to the extent they single out aliens as a class for the very harsh additional punishment, in a misdemeanor criminal case, of *banishment*. To withstand constitutional scrutiny, an alien classification must be shown by the government to be founded upon a compelling purpose or interest with "reasonable means" selected to cure the "gravest of abuses, endangering paramount interests." No such showing was made in the appellate court below and in rejecting the position of Petitioner, serious questions of constitutional law and statutory application are thus presented for consideration and resolution by this Court.

One final point needs to be made by Petitioner in this petition. Not only did the Fifth Circuit sanction Petitioner's cursory treatment by the trial court, but the Fifth Circuit, itself, chose, once more, to summarily dispose of this case, declining to write an opinion and properly set out the grounds for its conclusion. Petitioner respectfully submits the Fifth Circuit's invocation of its Local Rule 21 in this, a criminal case, serves to deprive an individual of his right under the constitution and due process clause to have the merits of his case completely and seriously determined in the appellate system. The Fifth Circuit's *per curiam* decision has itself rendered Petitioner's effort to obtain certiorari unncessarily difficult, the actual basis of the Judgment being initially shrouded in secrecy.

Thus, Petitioner would respectfully request that this Court grant immediate certiorari and, under authority of

its recent decisions, that it remand this case to the Circuit Court for proper articulation of the grounds for its decision. *Northcross v. Board of Education of Memphis*, 412 U.S. 427, 93 S.Ct. 2201 (1973); *Taylor v. McKeithen*, 407 U.S. 191, 92 S.Ct. 1980 (1972); *California v. Krivda*, 409 U.S. 33, 93 S.Ct. 32 (1972). Thereafter, this case can and should proceed to its proper and complete adjudication, in this Court, on the merits.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2778

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

GABRIEL BADARACCO,
Defendant-Appellant

Appeal from the United States District Court for the Southern District of Florida

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(March 14, 1975)

Before TUTTLE, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

Issued as Mandate:

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[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

[TITLE OMITTED]

(Filed April 8, 1975)

ON PETITION FOR REHEARING

(April 8, 1975)

Before TUTTLE, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX C

TITLE 21, UNITED STATES CODE

§ 844. Penalty for simple possession; conditional discharge and expunging of records for first offense

(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection

shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this subsection have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(b) (1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this subchapter or subchapter II of this chapter, or any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the Department of Justice solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such

person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under this part for second or subsequent convictions) or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

(2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person, if he was not over twenty-one years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained by the Department of Justice under paragraph (1)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty-one years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.
Pub.L. 91-513, Title II, § 404, Oct. 27, 1970, 84 Stat. 1264.

APPENDIX D

TITLE 8, UNITED STATES CODE

§ 1251. Deportable aliens—General classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

(3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States;

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 1305 of this title unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 1306 (c) of this title, or under section 36(c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of sections 611 to 621 of Title 22, or has been convicted under section 1546 of Title 18;

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subsdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may

now bear, or may hereafter adopt: Provided, That nothing in this paragraph, or in any other provision of this chapter, shall be construed as declaring that the Communist Party does not advocate the overthrow of Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 786 of Title 50, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so

required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety, of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of of-

ficers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in paragraph (G) of this subdivision;

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 1182(a) of this title, unless the Attorney General is satisfied, in the case of any alien within category (C) of paragraph (29) of section 1182(a) of this title, that such alien did not have knowledge or reason to believe at the time such alien became a member of, affiliated with, or participated in the activities of the organization (and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 786 of Title 50 have such knowledge or reason to believe) that such organization was a Communist organization;

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory transportation company under section 1228(a) of this title and was without the required period of stay in such foreign contiguous territory or adjacent islands following such arrival (other than an alien who is a native-born citizen of any of the countries enumerated in section 1101(a)(27)(A) of this title and an alien described in section 1101(a)(27)(B) of this title);

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation,

sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 1182(a) of this title; or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: an Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes", approved June 15, 1917, or the amendment thereof approved May 16, 1918; sections 791, 792, 793, 794, 2388, and 3241, of Title 18; an Act entitled "An Act to prevent in time of war departure from and entry into the United States contrary to the public safety", approved May 22, 1918; section 1185 of this title; an Act entitled "An Act to punish the willful injury or destruction of war material or of war premises or utilities used in connection with war material, and for other purposes", approved April 20, 1918; sections 2151, 2153, 2154, 2155, and 2156 of Title 18; an Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States", approved May 18, 1917, or any amendment thereof or supplement thereto; the Selective Training and Service Act of 1940; the Selective Service Act of 1948; the Universal Military Training and Service Act; an Act entitled "An Act to punish persons who make threats against the President of the United States", approved February 14, 1917; section 871 of Title 18; an Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes", approved October 6, 1917,

or any amendment thereof; the Trading With the Enemy Act; section 6 of the Penal Code of the United States; section 2384 of Title 18; has been convicted of any offense against section 13 of the Penal Code of the United States committed during the period of August 1, 1914, to April 6, 1917, or of a conspiracy occurring within said period to commit an offense under said section 13 or of any offense committed during said period against the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, in aid of a belligerent in the European war; section 960 of Title 18; or

(18) has been convicted under section 1328 of this title or under section 4 of the Immigration Act of February 5, 1917.

Nonapplicability of subsection (a) (4)

(b) The provisions of subsection (a) (4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall

not apply in the case of any alien who is charged with being deportable from the United States under subsection (a) (11) of this section.

Fraudulent entry

(c) An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 1182(a) of this title, and to be in the United States in violation of this chapter within the meaning of subsection (a) (2) of this section, if (1) hereafter he or she obtains any entry into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years prior to such entry of the alien and which, within two years subsequent to any entry of the alien into the United States, shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws; or (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.

Applicability to all aliens

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section, notwithstanding (1) that any such alien entered the United States prior to June 27,

1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952.

Deportation of certain nonimmigrants

(e) An alien, admitted as a nonimmigrant under the provisions of either section 1101(a)(15)(A)(i) or 1101(a)(15)(G)(i) of this title, and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State, unless such alien is subject to deportation under subsection (a)(6) or (7) of this section.

Relationship to United States citizen or lawfully admitted alien as affecting deportation for fraudulent entry

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

June 27, 1952, ch. 477, Title II, ch. 5, § 241, 66 Stat. 204; July 18, 1956, c. 629, Title III, § 301(b), (c), 70 Stat. 575; July 14, 1960, Pub.L. 86-648, § 9, 74 Stat. 505; Sept. 26, 1961, Pub.L. 87-301, § 16, 75 Stat. 655; Oct. 3, 1965, Pub.L. 89-236, § 11(e), 79 Stat. 918.

APPENDIX E

RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

VII. JUDGMENT

Rule 32. Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or alter the bail. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudica-

tion and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant

or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

(f) Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

As amended Apr. 24, 1972, eff. Oct. 1, 1972.

No. 74-1401

Supreme Court, U.S.
FILED
SEP 8 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

GABRIEL BADARACCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1401

GABRIEL BADARACCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court adjudicated him guilty and sentenced him without providing him adequate opportunity to present mitigating facts, and that 8 U.S.C. 125(a)(11), providing for deportation of aliens convicted of narcotics violations, is unconstitutional.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a controlled substance (cocaine), in violation of 21 U.S.C. 844(a).[1] He was adjudicated guilty and sentenced to two years' probation. The court of appeals affirmed *per curiam* (Pet. App. 1).

The evidence showed that on January 17, 1974, petitioner, a Dutch citizen, arrived at Miami International

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[1]The jury acquitted petitioner of having imported cocaine into this country.

Airport from Curacao, Netherlands Antilles. Customs agents noticed that he appeared nervous and walked with a slight limp. A search revealed that petitioner had 14.9 grams of cocaine[2] (wrapped in seven individual tinfoil packets) under his pants.

1. The record refutes petitioner's claim that the district court adjudicated him guilty and sentenced him while under a misapprehension as to the consequences of the conviction and without giving him adequate opportunity to present facts in mitigation.

After the jury verdict of guilty on June 11, 1974, the court advised petitioner that sentencing would take place on the following day at 3:00 p.m. (App. 13).[3] Petitioner made no objection to this procedure. At the sentencing hearing on the following day, petitioner's counsel delineated some of the adverse consequences to petitioner that would or might result from an adjudication of guilt. This discussion included the following colloquy (App. 17-18):

> MR. BARTEL: Your Honor, I hope we have set out in the brief period of time allotted the unusual predicament that this defendant finds himself. If

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[2]Petitioner's statement (Pet. 3) that he was charged and convicted of possession of 1.25 grams of cocaine is erroneous. See the information, verdict and judgment reproduced in the Appendix on appeal (App. 1-3), a copy of which we are lodging with the Clerk of this Court. That Appendix is hereafter referred to as "App.".

[3]21 U.S.C. 844(b)(1) provides in pertinent part:

> If any person who has not previously been convicted of [simple possession of a controlled substance] * * * is found guilty of a violation * * * the court may, without entering a judgment of guilty * * * place him on probation * * * . [U]pon expiration of [probation] the court shall discharge such person and dismiss the proceedings against him. * * * Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime * * * .

> your Honor should mete out an adjudication there would be some severe indirect consequences that would accrue, particularly the strong possibility of deportation immediately and the severance of this defendant from his family.
>
> THE COURT: Now, it is a misdemeanor, is it not?
>
> MR. BARTEL: Yes, sir. But I am concerned that the narcotics deportation act may not make a distinction between a felony and a misdemeanor. I sincerely believe that would be the case.
>
> THE COURT: You are not absolutely sure but that is your belief at the moment?
>
> MR. BARTEL: Well, I have found one citation—one of the unfortunate consequences of having been asked to present this matter under short notice—but I have one citation, 8 USC 1215, and it seems to provide that any law relating to the illicit possession of a narcotic drug gives rise to the right of deportation.

Petitioner's counsel further indicated that a narcotics conviction might affect his client's opportunities to enter graduate school and become a Certified Public Accountant (App. 19-23). The court also received, prior to sentencing, letters of support from petitioner's father, two college professors, and the Bishop of the Netherlands Antilles (App. 17).

After hearing the arguments presented by counsel for petitioner and the prosecution, the court stated (App. 27-28):

> THE COURT: Because of the nature of this offense and all the circumstances, I feel that the withholding of adjudication should not occur and that there should be adjudication.

> Therefore, Gabriel Badaracco, upon a verdict of guilty as to Count 2 which was rendered by a jury yesterday, the Court now adjudges you guilty.
>
> I have reflected probably more intensely on this case than counsel's short time reference would indicate, and I am prepared now to proceed with the sentencing.
>
> It is adjudged that imposition of sentence of confinement will be withheld and you, Gabriel Badaracco be placed on probation for a period of two years under the standing conditions of probation as defined by the Court's order entered August 1, 1964; except that during the period of your absence from the United States you shall not be required to report to the probation officer.

In short, the record discloses that the district court was clearly advised that upon adjudication of guilt petitioner would be subject to possible deportation,[4] and, accordingly, the adjudication was not rendered as a result of a mistake of law.[5] In any event, the trial court determined, in the exercise of its discretion, regardless of the possible collateral effects, that petitioner's offense required an adjudication of guilt.[6]

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[4]Deportation under Section 1251 does not necessarily follow automatically upon commission by an alien of any of the acts specifically listed therein as grounds for deportation. The Attorney General may and does in appropriate cases exercise his discretion to decline to bring proceedings under that section.

[5]As petitioner notes, the Assistant United States Attorney stated that he did not think petitioner would be deported (App. 25). A reading of this statement in context, however, shows that it was not intended as a representation of the law or of government policy; indeed, the prosecutor indicated that he was not certain as to the immigration implications of petitioner's adjudication (App. 26).

[6]Petitioner also argues that the trial court's uncertainty of deportation as a consequence is further manifested by its subsequent recommendation against deportation. However, this recommendation was added solely at the request of defense counsel (App. 29) and it did not indicate anything about the court's views as to the possible deportation of petitioner.

Nor did the court impermissibly limit petitioner in his ability to present facts in mitigation. The court had before it several character references (at least two of which had been prepared a week prior to trial (App. 38, 39)), and it acted within its broad discretion in determining not to avail itself of a presentence report. See, *e.g.*, *United States* v. *Rosciano*, 499 F.2d 166, 168-170 (C.A. 7).

2. The Immigration and Naturalization authorities have not commenced deportation proceedings against petitioner, and therefore his challenge to the constitutionality of 8 U.S.C. 1251(a) is premature. *O'Shea* v. *Littleton*, 414 U.S. 488. In any event, Congress has plenary power to establish the conditions under which aliens may enter and remain in this country (*Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589) and, accordingly, does not offend the Equal Protection Clause or substantive due process by providing for the deportation of alien violators of the narcotics laws.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.